No. 84-592

In The
Supreme Court of the United States
October Term, 1984

NORMAN WILLIAMS and SUSAN LEVINE,
Appellants,
v.
STATE OF VERMONT and
WILLIAM H. CONWAY, JR., COMMISSIONER,
VERMONT DEPARTMENT OF MOTOR VEHICLES,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

APPELLANTS' BRIEF

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QUESTIONS PRESENTED

1. Does a state motor vehicle "use" tax, which facially discriminates on the basis of residency in granting tax credits, violate the Equal Protection or Privileges and Immunities Clause of the United States Constitution?

2. Does the Commerce Clause prohibit a state from imposing a "use" tax on property brought from another state without granting credit for sales tax paid to the state of origin?

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OPINIONS BELOW

The Opinion of the Supreme Court of Vermont was not reported but is reprinted at p. 20 of the Joint Appendix (J.A.). (The opinion upon which the Vermont Supreme Court relied, *Leverson v. Conway*, 114 Vt. 523, 481 A.2d 1029 (1984), is reprinted at p. 21 of the Joint Appendix).

The unreported Order of the Vermont Supreme Court denying appellants' motion for reargument is reprinted at p. 38 of the Joint Appendix.

The unreported Opinion of the Superior Court of Vermont for Washington County is reprinted at p. 11 of the Joint Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). This appeal was docketed within ninety days from the entry of the Order of the Supreme Court of Vermont denying reargument in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, § 1, cl. 4, United States Constitution:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article IV, § 2, cl. 1, United States Constitution:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Article I, § 8, cl. 3, United States Constitution:

The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

Vt. Stat. Ann. tit. 32, §§ 8901, 8902(2), 8903, 8905(b), 8907, 8909, 8911:

[The pertinent text of these statutes is reprinted at pages 48a-59a of the Jurisdictional Statement.]

STATEMENT OF THE CASE [1]

Appellant Williams

On February 1, 1981, appellant Norman Williams moved to Vermont, where he now lives. He brought with him a 1980 Volkswagen Dasher Diesel, purchased for $9,300 in Chicago Heights, Illinois, on December 10, 1980. At the time of the purchase he paid a five percent Illinois sales tax, or $465.

Appellant Williams' Illinois registration expired on September 30, 1981. As a Vermont resident under Vt. Stat. Ann. tit. 23, § 4(30), he was then required to register his motor vehicle in Vermont by Vt. Stat. Ann. tit. 23, § 301. (Vt. Stat. Ann. tit. 23, §§ 4(30) and 301 are reprinted at Appendix B to this Brief). Absent payment, the Department of Motor Vehicles and Appellee William Conway, its Commissioner, refused vehicle registration.

After an action filed in Federal District Court for the District of Vermont challenging the tax was dismissed on jurisdictional grounds under the Tax Injunction Act, appellant Williams on August 27, 1982, again presented a completed Registration Tax and Title Application to the Department of Motor Vehicles. Based on a "low book" value for the car of $4,300, the Department assessed and appellant Williams paid under protest a four percent tax of $172. After paying the tax, Williams requested a hear-

1. This statement is based on appellants' amended complaint, J.A. 4. Because this case is appealed from an Order of the Vermont Superior Court granting appellees' motion to dismiss, J.A. 11, the allegations in the amended complaint, and all reasonable inferences that may be drawn therefrom, must be assumed to be true under Rule 12, V.R.Civ.P. *See, e.g., Bressler v. Keller,* 139 Vt. 401, 429 A.2d 1306 (1981).

ing before the Department of Motor Vehicles. In findings of fact and a decision dated October 26, 1982, the hearing officer ruled that the Department could not reach the constitutional questions raised and dismissed the appeal.

Appellant Williams on November 22, 1982, filed a complaint in the Superior Court for Washington County, Vermont, seeking a refund of the tax paid and a declaratory judgment that Vermont's purchase and use tax scheme for motor vehicles was unconstitutional under the Equal Protection Clause, Privileges and Immunities Clause, and Commerce Clause of the U.S. Constitution and under the Proportional Contribution Clause of the Vermont Constitution. In lieu of answering the complaint, Appellees on December 23, 1982, moved to dismiss under Rule 12, V.R. Civ.P. J.A. 3.

Appellant Levine

On January 23, 1983, before any judgment in the case was rendered, appellant Susan Levine moved to intervene in *Williams v. Vermont* as a party-plaintiff, and an amended complaint stating the claims of both appellants was filed. J.A. 4. Miss Levine had moved to South Burlington, Vermont, from Saranac Lake, New York, in November, 1979. She brought with her a 1979 Chrysler Horizon purchased on September 29, 1978, for $4,923.40 from Upstate Service and Body Works, Inc., in Saranac Lake, New York. At the time of purchase, she had paid a seven percent New York sales tax, or $344.64.

On December 16, 1982, and before expiration of her New York registration, Miss Levine presented a completed Registration Tax and Title Application to the Vermont Department of Motor Vehicles. Based on a "low

book" value of $2,750, the Department of Motor Vehicles assessed, and appellant Levine paid, a four percent "use" tax to Vermont of $110.

The Vermont Superior Court granted appellant Levine's motion to intervene on January 26, 1983. J.A. 1. It granted the Appellees' motion to dismiss on February 24, 1983. The Superior Court held that, although the Vermont motor vehicle purchase and use tax did discriminate on the basis of residency, such discrimination was "rationally related" to the cost of maintaining state highways and therefore did not violate the Equal Protection Clause. It applied the same "rational basis" test in concluding that the statutory scheme did not violate the Privileges and Immunities Clause. Finally, the Superior Court ruled that no "discrimination against interstate commerce" had been "demonstrated" and dismissed appellants' claim under the Commerce Clause of the U.S. Constitution as well. J.A. 11.

Appellants filed a notice of appeal to the Vermont Supreme Court on March 22, 1983. J.A. 19. They asserted the same four claims for relief before the Vermont Supreme Court: violation of the Equal Protection, Privileges and Immunities, and Commerce Clauses of the U.S. Constitution and violation of the Proportional Contribution Clause of the Vermont Constitution. After submission of memoranda and oral argument, the Vermont Supreme Court rejected appellants' claims and affirmed the lower court's dismissal. The appellants moved for reargument on June 27, 1984, based in part on this Court's decision in *Armco, Inc. v. Hardesty,* 52 U.S.L.W. 4787 (1984). J.A. 35. That motion was denied without opinion by the Vermont Supreme Court on July 9, 1984. J.A. 38.

SUMMARY OF ARGUMENT

This appeal challenges a discriminatory Vermont tax scheme in which "[p]rovincial interests and local political power are at their maximum." *Nippert v. City of Richmond*, 327 U.S. 416, 434 (1946). The law in question—Vermont's motor vehicle purchase and use tax—requires out-of-staters who move to Vermont to pay a four percent tax on their cars. Residents in otherwise identical circumstances completely avoid the tax. Appellants believe the tax scheme violates the Equal Protection, Privileges and Immunities, and Commerce Clauses of the United States Constitution.

Vermont's motor vehicle tax works through a system of credits. Nominally, the state requires all persons registering their cars for the first time to pay a four percent "purchase and use" tax on the value of their cars. However, Vermont *residents* who acquired cars in other states are granted a credit for sales tax paid there. Nonresidents in the same circumstances are denied that credit.[2]

Here, appellant Levine paid a purchase and use tax of $110 to register her car in Vermont, even though she had already paid sales tax of $344.64 to New York. Appellant Williams paid purchase and use tax of $172 to register his car in Vermont, even though he had already paid sales tax of $465 to Illinois. (Such charges were in

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2. Vermont is one of only four states which does not grant a sales tax credit with respect to motor vehicles purchased elsewhere. The other three states, Indiana, Maryland and Oklahoma, deny the credit to everyone, not just nonresidents or recent residents. A compilation of the relevant statutes of all 50 states is set forth in Appendix B to this Brief.

addition to the flat registration fee imposed by the Vermont Motor Vehicle Department.) Because they were not Vermont residents when they purchased their cars, neither appellant was granted a sales tax credit. Vermont residents in exactly the same circumstances as appellants would have been granted a credit and would have paid *no* purchase and use tax to Vermont.

The resident/nonresident discrimination manifest in Vermont's motor vehicle tax scheme violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of art. IV, § 2 of the Constitution. With respect to the Equal Protection Clause, the statute infringes appellants' fundamental "right to travel" or, more precisely, their "right to interstate migration." The announced purpose of the law—enhancement of the state highway fund—simply does not pass constitutional muster. With respect to the Privileges and Immunities Clause, the Vermont law plainly violates a "norm of comity" by imposing greater tax burdens on nonresidents than on residents in identical circumstances. (It also affects appellants' constitutionally-protected rights to travel, hold property and pursue a livelihood.) Because nonresidents do not constitute a "peculiar source" of highway deterioration, the law cannot survive the Privileges and Immunities Clause.

Apart from its discriminatory aspect, Vermont's motor vehicle purchase and use tax violates the Commerce Clause of the Constitution. As the Vermont Supreme Court has stated, the tax is designed to encourage individuals to purchase cars in Vermont. Were similar laws enacted in other states, automobile buying patterns in this nation would be substantially altered. Such economic dis-

tortion is not permitted by the Commerce Clause. While states may impose use taxes to *equalize* tax burdens on in-state and out-of-state purchases, they may not encourage local purchases by imposing *higher* taxes on goods acquired out-of-state.

ARGUMENT

I. Vermont's Motor Vehicle Purchase And Use Tax Fails To Meet The Requirements Of The Equal Protection Clause.

The right of strangers or newcomers to equal treatment under the law is a right which runs through this nation's history,[3] as it does through western civilization.[4] In

3. In 1776, a committee of the Continental Congress drafted two articles forbidding one colony from discriminating against inhabitants of another. *See* Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1, 2-5 (1967). These two prohibitions were incorporated into Article IV of the Articles of Confederation the following year, then shortened to form art. IV, § 2 of the U.S. Constitution in 1789. Judicially, Justice Washington recognized the right to travel in *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230), and it has been consistently applied since. For a history of judicial protection in the United States against discrimination based on residency, see J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, 807-809 (2d ed. 1983). *See also*, Z. Chafee, *Three Human Rights In The Constitution of 1787* (1956).

4. As noted in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974), the Old Testament commands, "Ye shall have one manner of law, as well for the stranger, as one of your own." *Leviticus* 24:22 (King James). In England, legal protection of "alien friends" has been shown to be rooted in the Magna Carta. *See* R. Howell, *The Privileges and Immunities of State Citizenship*, 9-13 (1918).

our federal system, that right provides an important counter-balance to state sovereignty—individuals dissatisfied with the laws of a particular state government are free to "vote with their feet" by migrating elsewhere without penalty.[5]

This right has been judicially recognized as the "right to travel" or, more particularly in this case, the "right to free interstate migration."[6] As this Court stated in *United States v. Guest*, 383 U.S. 745, 757-758 (1966):

> The constitutional right to travel from one state to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept

5. For a discussion of the "structural" aspect of the "right to travel" in our federal system, *see Austin v. New Hampshire*, 420 U.S. 656, 662 (1975).

6. The right to free interstate migration is a distinct subspecies of the broader right to travel, as this Court pointed out in *Memorial Hospital*, 415 U.S. at 255 (1974):

> [T]he right to travel was involved only in a limited sense in *Shapiro [v. Thompson*, 394 U.S. 618 (1969)]. The Court was there concerned only with the right to migrate "with intent to settle and abide," or, as the Court put it, "to migrate, resettle, find a new job, and start a new life."

In this context, the Vermont Supreme Court's conclusion that the right to travel is not implicated in this case because "[i]t is certainly possible to get from place to place using public transportation or by taking advantage of friends or family members," *Leverson*, 144 Vt. at 530, 481 A.2d 1029 (1984), J.A. 27, (quoting *Wells v. Malloy*, 402 F.Supp. 856, 859 (D.Vt. 1975)), is very much beside the point. Appellants complain because, as nonresidents, they must pay a tax that residents in identical circumstances do not. It is only incidental that this tax, because it is levied on automobiles, may also affect appellants' ability "to get from place to place," as the Vermont Supreme Court put it.

> of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

This Court has vindicated the "right to travel" by striking down state laws concerning taxes,[7] welfare,[8] medical benefits,[9] voting rights,[10] and, most recently, dividend payments which discriminate on the basis of residency.[11] Each of these decisions has been grounded on the Equal Protection Clause of the Fourteenth Amendment.

The fact of discrimination based on residency by the state of Vermont is undeniable in this case. As the Vermont Superior Court stated, "We are persuaded that 32 V.S.A. 8911 does not afford, on its face, equal treatment to residents and nonresidents who purchase cars out-of-state." J.A. 14.

More precisely, Vermont discriminates against *new* residents and in favor of old ones. Under Vt. Stat. Ann.

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7. *WHYY, Inc. v. Borough of Glassboro,* 393 U.S. 117 (1968) (New Jersey statute denying tax exemption to foreign nonprofit corporations struck down); *Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949) (Ohio tax on intangible personal property held by foreign corporations or nonresidents held invalid).

8. *Shapiro v. Thompson,* 394 U.S. 618 (1969) (no durational residency requirement permitted with respect to receipt of welfare benefits).

9. *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (statute requiring one year residence in county prior to receipt of non-emergency asthma treatment struck down).

10. *Dunn v. Blumstein,* 405 U.S. 330 (1972) (one-year residency requirement to vote in state election rejected); *Oregon v. Mitchell,* 400 U.S. 112 (1970) (federal voting rights statute abolishing residency requirements for federal elections upheld).

11. *Zobel v. Williams,* 457 U.S. 55 (1982) (statute distributing income derived from state's natural resources to state citizens in varying amounts based on length of residency invalid).

tit. 32, §8903(b), all residents, new or old, who register their cars in Vermont for the first time are nominally required to pay a four percent tax on the cost of their car[12] or $600, whichever is less, unless they paid a sales tax *to Vermont* when purchasing their car. For those who did not purchase their cars in Vermont, the crucial question is whether they were Vermont residents at the time of purchase. If so, they are entitled to a credit for sales tax paid to the other state, provided that state would grant credit for Vermont taxes paid under similar circumstances. Vt. Stat. Ann. tit. 32, §8911(9).[13] If not, they are denied any tax credit.[14]

The plain effect of Vermont's statute is to impose a tax on those who come to Vermont which is not imposed

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12. Although Vt. Stat. Ann. tit. 32, § 8903(b) requires the tax to be computed on the basis of the cost of the car, the Vermont Department of Motor Vehicles, as a matter of practice, determines it on the basis of the car's current or "book" value.

13. In this case, both of the states where appellants purchased their cars, New York and Illinois, do grant reciprocal credit. According to the Vermont Department of Motor Vehicles, 35 states grant such credit.

14. Nonresidents were granted an identical credit until September 1, 1980, when Vt. Stat. Ann. tit. 32 § 8911(6) was repealed. As enacted in 1960, former section 8911 provided:

> The tax imposed by this act shall not apply to:
>
> . . .
>
> (6) pleasure cars, the owners of which were not residents of this state at the time of purchase and had registered and used the vehicle for at least thirty days in a state or province other than Vermont.

1959 Vt. Acts No. 327, § 10 (Adj. Session).

on those already there. Because tax discrimination based on residency is plain under the statute,[15] the issue in the case becomes whether that discrimination can be justified by a legitimate state interest. Since Vermont law effectively imposes a penalty for changing one's residence, appellants believe that "heightened" or "strict" scrutiny is appropriate under the Equal Protection Clause. However, appellants also contend that the Vermont law could not survive even the so-called "rational basis" test under such decisions as *Zobel v. Williams,* 457 U.S. 55 (1982); *WHYY v. Glassboro,* 393 U.S. 117 (1968); and *Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949).

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15. Appellants note that the State, in its Motion to Dismiss or Affirm filed with this Court in the related case of *Leverson v. Conway,* No. 84-315 (1984), has asserted for the first time that individuals in appellants' position would have been required to pay the Vermont motor vehicle purchase and use tax even if they were residents of Vermont when they acquired their cars out-of-state. Appellee's Motion to Dismiss at 4. This assertion flies directly in the face of Vt. Stat. Ann. tit. 32, § 8911(9). It is also contrary to the opinion of the Vermont Supreme Court in *Leverson:*

> Residents who purchase pleasure cars outside the state and pay a sales or use tax to another state are exempt from paying a use tax to the State of Vermont, at least to the extent of the tax paid the other state, providing the state of purchase has a reciprocal agreement with Vermont that grants a similar credit for Vermont Tax paid under similar circumstances. [32 V.S.A.] § 8911(9).

144 Vt. at 527.

That interpretation of the Vermont Supreme Court accords with appellants' view and is, of course, binding on this Court. *See Wheeling Steel Corporation v. Glander,* 337 U.S. 562, 566 (1949) (statutory interpretation of Ohio Supreme Court becomes part of the statute for purposes of the U.S. Supreme Court).

A. Vermont's Discriminatory Tax Laws Cannot Survive The "Heightened" or "Strict" Scrutiny Appropriate Under The Equal Protection Clause In This Case.

The Court defined the relationship between the right to travel and the modern equal protection analysis in *Shapiro v. Thompson,* 394 U.S. 618 (1969). *Shapiro* involved durational residency requirements imposed on indigents as a condition of receiving welfare benefits. The requirement resulted in two classes: those who had lived in the state more than a year and those who had not. In deciding whether that classification violated the Equal Protection Clause, the Court was faced with the question of which equal protection standard to apply:

> At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved in to the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right [to travel], and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

394 U.S. at 634 (citations omitted) (emphasis in original).

Shapiro went on to find that the primary purpose for the residency requirement—the fiscal integrity of the state's welfare benefit program—could not meet the heavy burden imposed by the compelling state interest test. Although the state's concerns were legitimate, the Court said, "a State may not accomplish such a purpose by invidious

distinctions between classes of its citizens. . . . [A]ppellants must do more than show that denying welfare benefits to new residents saves money." 394 U.S. at 633.

Decisions following *Shapiro* have clarified its holding that plaintiffs alleging a violation of their right to travel need not demonstrate that a particular law *deterred* them (or anyone else) from moving but only that they were *penalized* for doing so. As the Court said in *Dunn v. Blumstein,* 405 U.S. 330 (1972):

> Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence. In Shapiro we explicitly stated that the compelling state interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel] . . ."

405 U.S. at 340 (emphasis and bracketed material in original).

In *Dunn,* and in such cases as *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1978), a "strict scrutiny" analysis applied and the challenged state statute was invalidated under the Equal Protection Clause. *See also Oregon v. Mitchell,* 400 U.S. 112, 238 (1970) (Opinion of Brennan, White, and Marshall, JJ.), and *Zobel v. Williams,* 457 U.S. 55, 66 n.1 (1982) (Brennan, Marshall, Blackmun, and Powell, JJ., concurring).

In this case, Vermont violates the appellants' right to travel from state to state by effectively imposing a penalty, in the form of a four percent tax on their automobiles, for the decision to reside in Vermont. The only official justification advanced for the tax is to guarantee the fiscal integrity of the state's highway system. *See* Vt.

Stat. Ann. tit. 32, §8901 ("The purpose of this chapter is to thereby improve and maintain the state and interstate highway system, to pay the principal and interest on bonds issued for the improvement and maintenance of those systems and to pay the cost of administering this chapter").[16] That justification does not meet the compelling state interest test imposed by the Equal Protection Clause in these circumstances. As the Court said in *Memorial Hospital*:

> The conservation of the taxpayer's purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State.

415 U.S. at 263. *See also Sosna v. Iowa,* 419 U.S. 393, 544 (1975) (budgetary considerations insufficient to outweigh constitutional claims of individuals under Equal Protection Clause).

B. Vermont's Motor Vehicle Purchase And Use Tax Also Fails To Meet The "Rational Basis" Test Of The Fourteenth Amendment.

In *WHYY, Inc. v. Borough of Glassboro,* 393 U.S. 117 (1968); *Wheeling Steel Corporation v. Glander,* 337 U.S. 562 (1949); and, most recently, *Zobel v. Williams,* 457 U.S. 55 (1982), this Court overturned state statutes which discriminated on the basis of residency under the Equal Protection Clause without determining whether a "heightened

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16. The Vermont Supreme Court suggested another possible legislative purpose behind the motor vehicle tax scheme: encouragement of in-state motor vehicle purchases. *See Leverson,* 144 Vt. at 532, 481 A.2d at 1034, 1035 (1984), J.A. 29. As appellants demonstrate in Part III of this Brief, such a purpose is entirely illegitimate under the Commerce Clause.

scrutiny" or "rational basis" analysis applied. The reasoning of those cases applies with equal force here and supports reversal of the Vermont Supreme Court's decision.

Like the instant case, both *WHYY* and *Wheeling Steel* involved discriminatory state taxes. In *WHYY*, the New Jersey Supreme Court had ruled that a Pennsylvania nonprofit television station with facilities in New Jersey was not entitled to the same property tax exemptions as a similar New Jersey corporation. It held that the state's asserted interest in avoiding additional administrative burdens "was not wholly irrational and sustained the denial of exemption." 393 U.S. at 199. This Court disagreed, finding that the asserted interest did not make sense: it was no more difficult to determine whether a foreign corporation met state law criteria for nonprofit status than it was to make the same determination for a local corporation. Accordingly, the *WHYY* Court reversed, holding that the Pennsylvania station could not be treated unequally "'solely because of the different residence of the owner.'" 393 U.S. at 120 (quoting *Wheeling Steel Corp.*, 337 U.S. at 572).

A similar result obtained in *Wheeling Steel*. There, Ohio had imposed an *ad valorem* tax on intangibles, such as notes or accounts receivable, held by foreign corporations or nonresidents with respect to goods manufactured in Ohio. Identical property owned by residents or domestic corporations was exempt from the tax, however. Ohio attempted to justify this resident/non-resident discrimination by arguing that other states could levy the same tax on Ohio residents, thus establishing a national equality of treatment. 337 U.S. at 573. This Court decisively rejected that reasoning: "It is clear that this plan of 'reciprocity' is not one which by credits or otherwise protects the nonresident or foreign corporation against the discriminations apparent in the Ohio statute." *Id.* at 574. It therefore invalidated the law as an impermissible violation of the Equal Protection Clause.

Most recently, in *Zobel*, this Court held that cash dividends could not be distributed by Alaska based on length of residency under the Equal Protection Clause. The Alaska Supreme Court had indicated three purposes for the residency distinctions: 1) a financial incentive to establish and maintain residence in Alaska; 2) prudent management of the state's natural resources fund; and 3) apportionment based on "tangible and intangible contributions" by residents over the years. 457 U.S. at 61. The *Zobel* Court rejected all three. The first two, it said, bore no rational relation to the statutory discrimination based on length of residence. The final purpose, while perhaps "rational," was not legitimate under the Fourteenth Amendment:

> Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.

457 U.S. at 64.

Vermont's discriminatory motor vehicle tax should also be rejected by this Court, even without "strict scrutiny" analysis under the Equal Protection Clause. The Vermont legislature has stated that the tax scheme is intended to swell Vermont's coffers, Vt. Stat. Ann. tit. 32,

§ 8901, and it is undoubtedly successful in this aim.[17] However, as *WHYY, Wheeling Steel,* and *Zobel* make clear, such a purpose cannot justify discrimination based on residency under the Fourteenth Amendment.

C. Those Decisions Upholding State Durational Residency Requirements Do Not Support Vermont's Discriminatory Tax Scheme In This Case.

While it is true that this Court has upheld state "durational residency" requirements against equal protection challenges in several cases, none of those decisions support the discrimination here. Each of those cases involved either: 1) a political right which went to the core of state governmental autonomy; or 2) a state benefit which had to be limited to bona fide residents if it was to be provided at all. Thus, in *Rosario v. Rockefeller,* 410 U.S. 752 (1973), this Court upheld a state statute requiring voters to enroll in the party of their choice 30 days before a general election in order to vote in the following primary and, in *Dunn v. Blumstein,* indicated its approval of "[a]n appropriately defined and uniformly applied requirement of bona fide residence" with respect to state elections. 405 U.S. at 343-344. Both *Rosario* and *Dunn* recognize that

17. As noted in appellants' Jurisdictional Statement, Appellees' counsel has stated publicly that about $1 million is brought into the state annually from the challenged tax on nonresidents. *Id.* at 12, n. 2. That figure appears to agree roughly with the most recent census figures, which suggest that about 14,400 individuals migrate to Vermont annually. See 1 Bureau of Census, U.S. Dept. of Commerce, *Characteristics of Population* 31 (1980). If one-fourth of such individuals owned automobiles on which they paid a purchase and use tax averaging $250 each, the amount generated annually would be $850,000.

state government, if it is to represent and enact laws to serve the needs of its residents, must be able to limit participation in the political process to bona fide state residents.

A state is also permitted to limit receipt of certain government benefits, as the Court recently held in *Martinez v. Bynum,* 103 S.Ct. 1838 (1983), and *Vlandis v. Klein,* 412 U.S. 441 (1973). *Martinez* ruled that a state may deny free public school education to children who come to the district primarily for free public education and whose parents or guardians do not reside there. In *Vlandis,* the Court indicated its approval of a Minnesota statute requiring one year of residency in order to qualify for lower, in-state college tuition (although *Vlandis* itself invalidated a Connecticut statute which forever barred nonresidents from becoming residents for the purposes of in-state tuition). *See* 412 U.S. at 452-453, n.9, citing with approval *Starns v. Malkerson,* 401 U.S. 985 (1971), *aff'g* 326 F. Supp. 234 (D.Minn. 1970). Both *Martinez* and *Vlandis* recognize that certain state-provided benefits, such as public education, must be limited to bona fide residents if they are to be provided properly to anyone.[18]

18. *Sosna v. Iowa,* 419 U.S. 393 (1975), which upheld a one-year residency requirement in connection with filing for divorce in Iowa, involved both "sovereignty" and "limited benefit" concerns. As the Court noted, Iowa had valid grounds for insuring a "modicum of attachment to the State." *Id.* at 407. With respect to the sovereignty of its judicial system, Iowa was properly concerned with comity ("officious inter-meddling in matters in which another State has a paramount interest") and reputation ("minimizing the susceptibility of its own divorce decrees to collateral attack"). With respect to providing a limited service, the Court said, "Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there as short a time as appellant." 419 U.S. at 407.

Neither the political process nor public benefit rationales can justify Vermont's discriminatory motor vehicle tax here. A constitutional prohibition against imposing greater tax burdens on outsiders than on a state's own residents does not jeopardize the state's ability to function as an independent political unit, as in *Rosario* and *Dunn*. Nor can it be argued under *Martinez* or *Starns* that Vermont's ability to maintain a highway system depends on its ability to charge nonresidents a tax which it does not charge residents in similar circumstances. In short, those cases in which the Court has upheld some discrimination between residents and nonresidents simply are not apposite here. They cannot justify Vermont's discriminatory motor vehicle tax scheme.[19]

II. Vermont's Motor Vehicle Purchase And Use Tax Violates Appellants' Rights Under The Privileges And Immunities Clause Of The Federal Constitution.

As this Court has noted, the Privileges and Immunities Clause was designed to prevent legislation discriminating against those with no political voice. The Vermont legislature, in imposing a four percent motor vehicle tax on those moving to Vermont which it does not impose on residents in otherwise identical circumstances, has enacted just such legislation.

This section will analyze Vermont's motor vehicle tax under the modern privileges and immunities test. The test first requires the Court to determine whether the individual right affected bears "upon the vitality of the Nation

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19. The "political process" and "public benefit" distinctions suggested here are explored in greater depth in Varat, *State Citizenship and Interstate Equality,* 48 U. Chi. L. Rev. 487 (1981).

as a single entity," *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371, 383 (1978), or is required for a "norm of comity," *Austin v. New Hampshire,* 420 U.S. 656, 660 (1975). If so, the challenged statute may not stand unless the nonresidents "constitute a peculiar source of the evil at which the statute is aimed" *and* there is a "substantial relationship" between that evil and the statutory discrimination against nonresidents. *Hicklin v. Orbeck,* 437 U.S. 518, 525-527 (1978). Because the rights asserted here are protected by the Privileges and Immunities Clause, and because appellants do not constitute a peculiar source of highway deterioration or any other "evil," Vermont's discriminatory tax scheme should not be permitted to stand.

A. The Privileges And Immunities Clause Is Intended To Protect The Constitutional Concept Of Federalism.

The Privileges and Immunities Clause of art. IV, § 2, cl. 1 of the U.S. Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The clause derives directly from the fourth Article of Confederation, which suggests its drafters' concerns:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

Although the Clause was shortened when included in the comity article of the Constitution, no diminution in meaning occurred. *Lemmon v. People,* 20 N.Y. 562, 608 (1860); *Paul v. Virginia,* 75 U.S. (8 Wall.) 168, 180 (1869). Indeed, Hamilton deemed the Clause "the basis of Union." *The Federalist* No. 80, at 478 (New American Library ed., 1961). *See also The Federalist* Nos. 3-5 (J. Jay) and Nos. 6-9 and 11 (A. Hamilton).

Now as then, the Privileges and Immunities Clause guarantees residents of each state a "general citizenship" throughout the United States, on an equal footing with residents of every other state. 2 Story, *Commentaries on the Constitution* § 1806 at 599 (4th ed. 1873).[20] The intent of the Clause is well-summarized in the leading case of *Toomer v. Witsell,* 334 U.S. 385 (1948):

> The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. "Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privileges with citizens of those States, the Republic should have constituted little more than a league of States; it would not have constituted the Union which now exists."

20. Story suggests the Clause was rewritten in the Constitution to avoid confusion among the terms "free inhabitants," "free citizens," and "people" which appear in the Articles of Confederation.

Id. at 395, 396 (quoting *Paul,* 75 U.S. (8 Wall.) at 180) (footnotes omitted).

In practice, one of the chief functions of the Clause is to prevent "taxation without representation," since those without a political voice provide an easy target for the revenue-ravenous legislator. The Court recognized this function explicitly in *Austin,* a case dealing with discriminatory state income taxes:

> Since nonresidents are not represented in the taxing State's legislative halls, judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions.

420 U.S. at 662, 663 (quoting *Travis v. Yale & Towne Manufacturing Co.,* 252 U.S. 60 (1920) (citations omitted.)[21]

"Taxation without representation" is precisely the problem here: those moving to Vermont and seeking to register their cars are confronted with a tax about which they

21. For discussions of the Privileges and Immunities Clause as a proxy for equal political representation, see J. Ely, *Democracy and Distrust* (1980), and Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV,* 128 U. Pa. L. Rev. 379 (1979).

had no say and which residents in otherwise identical circumstances do not pay. In sum, Vermont's motor vehicle purchase and use tax is exactly the kind of tax the Privileges and Immunities Clause was intended to prohibit.

B. Vermont's Discriminatory Tax Scheme Violates Individual Rights Protected By The Privileges And Immunities Clause.

The first step in reviewing a discriminatory state statute under the privileges and immunities analysis set out in *Baldwin,* and reaffirmed last term in *United Building and Construction Trades Council v. City of Camden,* 104 S.Ct. 1020, 1027-1028 (1984),[22] is to determine if the individual right affected is in fact protected by the Clause. As suggested, this Court has had no difficulty applying the Clause to state tax laws which unfairly burden nonresidents. The best and most recent examples of these cases

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22. *United Building* remanded an appeal challenging a municipal ordinance requiring 40 percent of workers on city construction projects to be city residents. The fact that appellants in *United Building* were residents of the state negates any suggestion by the Court in *Zobel* that residents may never bring privileges and immunities challenges. *See Zobel,* 457 U.S. at 60, n. 5. As the Court emphasized in *United Building,* the important point was that the ordinance necessarily discriminated against those who were not New Jersey residents as well as those who were but did not live in Camden.

The same reasoning applies here, perhaps with even greater force. Although both appellants were state residents under Vt. Stat. Ann. tit. 23, § 4(30) when they sought to register their cars and triggered the tax, the same discriminatory tax would also apply to nonresidents registering cars in Vermont. More important, the discrimination occurred because appellants were not Vermont residents when they purchased their cars out-of-state. Thus, they were treated differently when they ventured to reside in Vermont, which is precisely the sort of discrimination the Privileges and Immunities Clause is meant to forbid. *See United Building,* 104 S.Ct. at 1027.

is *Austin.* There, the Court struck down a New Hampshire statutory scheme which imposed an income tax on Maine residents working in the state where no similar tax was levied on state residents. Like the tax at issue here, the New Hampshire statutory scheme imposed liability on both residents and nonresidents, but then exempted residents from payment. 420 U.S. at 658, 659. In rejecting the scheme, the *Austin* Court said:

> Against this background establishing a rule of substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers, the New Hampshire Commuters Income Tax cannot be sustained. The overwhelming fact, as the State concedes, is that the tax falls exclusively on the income of nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone. Rather, the argument advanced in favor of the tax is that the ultimate burden it imposes is "not more onerous in effect" on nonresidents because their total state tax liability is unchanged once the tax credit they received from their State of residence is taken into account. While this argument has an initial appeal, it cannot be squared with the underlying policy of comity to which the Privileges and Immunities Clause commits us.

420 U.S. at 656, 666 (quoting *Shaffer v. Carter,* 252 U.S. 37 (1920)) (citations omitted).

The Court has also struck down discriminatory tax laws on the basis of the Privileges and Immunities Clause in *Ward v. Maryland,* 79 U.S. (12 Wall.) 418 (1871), and *Travis v. Yale & Towne Manufacturing Co.,* 252 U.S. 60 (1920). In *Ward,* the court disallowed a statute charging nonresidents $300 annually to trade in goods not manufactured in Maryland, while residents paid only $12 to $150, depending on inventory. In *Travis,* another case involv-

ing exemptions, the Court held unconstitutional a New York statute which denied out-of-staters favorable income tax treatment given New Yorkers. 252 U.S. at 80, 81.[23]

C. Nonresidents Do Not Constitute A "Peculiar Source" Of Road Deterioration Sufficient To Justify A Discriminatory Tax Against Them.

Once the comity test established by *Baldwin* and *Austin* is met, a discriminatory state statute must be invalidated unless: 1) nonresidents constitute a "peculiar source" of the evil at which the statute is aimed, and 2) there is a substantial relationship between the statute and elimination of the evil. In view of this Court's decision in

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23. Vermont's discriminatory tax on automobiles also affects appellants' right to reside in the state of their choice, as discussed in Part I of this Memorandum; their right to hold personal property; and their right to pursue a livelihood. Each of these rights is protected by the Privileges and Immunities Clause, as Justice Washington made clear in the influential early case of *Corfield v. Coryell,* 16 F.Cas. 546, 552 (CCED Pa. 1825) (No. 3,320). Since *Corfield,* the Court has protected from discrimination based on residency the right of free ingress into a state, *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1869) and the right to hold personal property, *Blake v. McClung,* 172 U.S. 239 (1898). In *Bell v. Burson,* 402 U.S. 535, 539 (1971), the Court recognized that use of one's automobile is frequently "essential in the pursuit of a livelihood." Since Vermont taxes such use unfairly, this case fits within a long line of decisions forbidding resident/nonresident discrimination which interferes with the right to pursue a livelihood. *United Building* (preference given to residents in municipal works jobs); *Toomer* (discriminatory shrimp boat license fee); *Mullaney v. Anderson,* 342 U.S. 415 (1952) (discriminatory commercial fishing license fee); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948) (denial of commercial fishing permits to resident aliens); *Chalker v. Birmingham & Northwestern Railway Co.,* 249 U.S. 522 (1919) (discriminatory tax on rail construction); and *Ward* (discriminatory tax on sale of goods not manufactured locally).

Hicklin, the "peculiar source" argument cannot be seriously maintained on these facts.

Hicklin involved an Alaskan statute requiring residents to be hired for oil and gas work in preference to nonresidents.[24] The statute purportedly was enacted to combat Alaska's high unemployment rate. Assuming for the sake of argument that discrimination to fight unemployment was permissible under the Privileges and Immunities Clause, the *Hicklin* court nonetheless struck down the law because nonresidents had not been shown to be the "peculiar" source of unemployment:

> . . . certainly no showing was made on this record that nonresidents were "a peculiar source of the evil" Alaska Hire was enacted to remedy, namely, Alaska's "uniquely high unemployment." Alaska Stat. Ann. § 38.40.020 (1977). What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents—especially the unemployed Eskimo and Indian residents—were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities; and that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being pre-

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24. As enacted, the statute required one year of residency in the state before any preference would be given. However, the Alaska Supreme Court struck down the durational residency requirement but still permitted preference on the basis of residency. Accordingly, the only question before the U.S. Supreme Court was discrimination between residents and nonresidents.

pared might be filled by nonresidents before the residents' training was completed.

437 U.S. at 526, 527 (footnotes omitted).[25]

Appellees in this case similarly cannot and have not argued that the use of Vermont highways by nonresidents who move to the state is a unique or even very significant cause of road deterioration. Use of the roads by those Vermont residents who do not pay tax, as well as by motorists passing through the state, by trucks, recreational vehicles, and resident cars, surely causes far more wear and tear than use by nonresidents who take up residence in Vermont. As is made clear in *Hicklin,* the fact that nonresidents may be *one* of many sources of the problem does not justify discriminatory treatment against them. *Id.*

III. Vermont's Motor Vehicle Purchase And Use Tax Scheme Violates The Commerce Clause Of The Federal Constitution.

Parts I and II of this Brief have argued that the residency discrimination manifest in Vermont's motor vehicle tax scheme violates the Equal Protection and Privileges and Immunities Clauses of the Constitution. Appellants believe that the tax also violates the Commerce Clause, even apart from that discrimination. The tax provides an illegal incentive for those planning to move to Vermont to wait and purchase their motor vehicles there. Both the purpose and effect of the tax cannot be squared with the Commerce Clause.

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25. The statute also failed to meet the "substantial relationship" test, since it was not closely tailored to aid the unemployed. See discussion at 437 U.S. 527, 528. In view of the failure of the "peculiar source" argument here, appellants believe the "substantial relationship" question need not be reached.

A. The Vermont Motor Vehicle Purchase And Use Tax Is Improperly Designed To Encourage Instate Motor Vehicle Purchases.

According to the Vermont Supreme Court, the Vermont Motor Vehicle Purchase and Use Tax has two purposes: to require users of Vermont's highways to "contribute toward their maintenance and improvement" and "to encourage residents to support the local economy by refusing to grant credit for taxes paid to any nonreciprocating state or province." *Leverson v. Conway,* 144 Vt. 523, 532-533, 481 A.2d 1029 (1984), J.A. 29-30. The tax also encourages nonresidents moving to Vermont to purchase a car in Vermont by refusing to grant them a tax credit. Such coercion violates the Commerce Clause.

Appellants agree that Vermont may charge users of its roads for maintenance and improvement costs. It could create toll roads or charge a higher flat annual vehicle registration fee or a higher annual registration fee based on the value of the vehicle. *Cf.* Cal. Rev. & Tax. Code §§ 10751-52 (West 1984). These alternatives would not violate the Commerce Clause because they would not induce individuals to buy their automobiles in Vermont rather than elsewhere.

What Vermont may not do is to impose a highway "user fee" as a means of illegally encouraging individuals to buy cars in Vermont. That point was made unmistakable last term in *Bacchus Imports, Ltd. v. Dias,* 52 U.S.L.W. 4979 (1984). *Bacchus* concerned a Hawaiian liquor tax which exempted *okolehao* (a native brandy) and fruit wine in order to encourage development of the local liquor industry. Applying a "strict rule of invalidity," 52 U.S.L.W. at 4981, this Court rejected the tax on Commerce Clause grounds. As it said:

> . . . [T]he legislation constitutes "economic protectionism" in every sense of the phrase. It has long been the law that States may not "build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore,* 100 U.S. 434, 443 (1880). Were it otherwise, "the trade and business of the country [would be] at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States." *Id.* at 442. It was to prohibit such a "multiplication of preferential trade areas" that the Commerce Clause was adopted. *Dean Milk Co. v. Madison,* 340 U.S. 349, 356 (1951).

52 U.S.L.W. at 4982. *See also Westinghouse Electric Corp. v. Tully,* 52 U.S.L.W. 4485, 4490 (1984) (rejecting state corporate franchise tax which imposed burdensome taxes on out-of-state transactions); *National Meat Association v. Deukmejian,* 743 F.2d 656, 659 (9th Cir. 1984) (protectionist measures employed by states subject to virtually per se rule of invalidity).

Vermont's motor vehicle tax suffers from the same infirmities as the taxes in *Bacchus* and *Westinghouse*. The selective denial of credits makes it more expensive for those affected to purchase outside Vermont. Because this result was a deliberate attempt to influence purchasing decisions in favor of Vermont businesses, a strict test of invalidity applies under the Commerce Clause and the tax should be stricken.

B. The Effect Of Vermont's Motor Vehicle Purchase And Use Tax Is To Discriminate Against Out-of-State Purchases In Violation Of The Commerce Clause.

This Court has never decided whether states imposing a use tax on personal property must also grant a credit against that tax for sales tax paid in other states. It is

undeniable that such a tax, if not fairly apportioned, acts as an economic barrier to the movement of goods from one state to another. By denying credit for sales tax paid other states, Vermont's one-time four percent motor vehicle use tax provides a considerable tax incentive for those in appellants' position to buy in Vermont.[26] Because Vermont's tax system would have a substantial impact on interstate commerce if applied by every other state, it does not meet the Commerce Clause tests under *Container Corp. of America v. Franchise Tax Board,* 103 S.Ct. 2933 (1983) or *Armco, Inc. v. Hardesty,* 52 U.S.L.W. 4787 (1984).[27]

1. Failure To Grant Sales Tax Credits Against An Unapportioned State Use Tax Violates The Underlying Purposes Of The Commerce Clause.

Courts and commentators alike have taken Justice Cardozo's opinion in *Henneford v. Silas Mason Co.,* 300

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26. By denying tax credit for sales tax paid to a "non-reciprocal" state, the tax also provides an incentive for Vermonters to purchase in "reciprocal" states or in Vermont itself. Because the states in which appellants purchased their cars are "reciprocal", the constitutionality of that provision is not addressed in this Brief. *Cf. Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941 (1982); *Western and Southern Life Insurance Co. v. Board of Equalization,* 451 U.S. 648 (1981).

27. By granting credit for sales tax paid by residents on motor vehicle purchases in "reciprocal" states, the Vermont tax has less discriminatory effect than similar taxes that grant such credits to no one. *Cf. W. Va. Code* § 17A-3-4 (Supp. 1984). Nonetheless, it is not the quantum but the certainty of discrimination that determines whether a tax violates the Commerce Clause. "It is well settled that '[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.'" *Bacchus Imports,* 104 S.Ct. at 3055 (1984) (tax exemption for locally-produced alcoholic beverages constituting less than 1% of liquor sold in Hawaii violated Commerce Clause) (quoting from *Maryland v. Louisiana,* 451 U.S. 725, 760 (1981)).

U.S. 577 (1937), as a starting point in discussing the constitutional validity of use taxes which do not grant credit for sales tax paid other states. *Henneford* explicitly reserved the issue of whether such a credit was constitutionally required, since that issue was not before the Court.[28] The instant case squarely presents the question,

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28. The Washington use tax at issue in *Henneford* did have a credit. After noting that "[e]very one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington," Justice Cardozo remarked at length upon the tax's "equality":

> When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subject to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local.

300 U.S. at 584.

Later in the opinion, however, Justice Cardozo was careful to note that the Court did not reach an issue not before it—whether a credit was constitutionally required:

> Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to

(Continued on following page)

however, since Vermont did not grant a compensating credit against its motor vehicle use tax to appellants for sales taxes paid New York and Illinois. Appellants believe that Vermont's motor vehicle use tax system conflicts with the purposes underlying the Commerce Clause, as well as the recent decisions of this Court in *Container Corp.* and *Armco.*

As Justice Cardozo recognized in *Henneford,* states in our federal system are, for many purposes, self-contained units. But one of the principal purposes behind the enactment of the Constitution was to end protective state tariffs—that is to say, to establish a nation in which the mobility of persons and goods would be entirely unaffected by excises imposed on goods simply because they were moved from one place to another. As the Court said in *Freeman v. Hewit,* 329 U.S. 249, 252 (1946): "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the States . . ."

This Court has long recognized that the Commerce Clause does not countenance state taxes that expose interstate commerce to multiple burdens not borne by local commerce. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 170 (1954). Accordingly, state taxes on

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> mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination. This statute by its framework avoids that possibility. The offsetting allowance has been conceded, whether the concession was necessary or not, and thus the system has been divested of any semblance of inequality or prejudice.

Id. at 577.

transactions or events having interstate elements must be fairly apportioned. This idea has received its fullest development in cases involving income, privilege, and gross receipts taxes. *E.g., Exxon Corp. v. Department of Revenue,* 447 U.S. 207 (1980); *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977); *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 255-57 (1938).

The same rules must be applied to use taxes.[29] Such a tax, when fairly apportioned to reflect *actual* use within a state, does not burden interstate commerce. For example, a highway user fee computed on some combination of factors reflecting value of the vehicle, miles driven, load borne, time spent within the state, or the like, would not create the danger that interstate commerce will be subjected to greater burdens than intrastate commerce. *Bode v. Barrett,* 344 U.S. 583 (1953), *aff'g* 412 Ill. 204, 106 N.E.2d 521 (1952) (annual license tax by weight of vehicle); *Capital Greyhound Lines v. Brice,* 339 U.S. 542, 546-47 (1950) (title fee based on value of vehicle, in conjunction with mileage charge); *Interstate Busses Corp. v. Blodgett,* 276 U.S. 245 (1928) (mileage tax on common carriers based on miles driven within state); *but cf. Sprout v. South Bend,* 277 U.S. 163, 169-70 (1928) (highway license fee disproportionate to use of roads struck down). A state may also levy a flat annual registration fee on all vehicles. *Hendrick v. Maryland,* 235 U.S. 610 (1915). The imposition of a use tax on an annual basis, rather than as a one-time levy, is itself a rough form of apportionment.

29. Because of the cumulative burden on interstate commerce, virtually every commentator to consider sales-and-use tax schemes without credit provisions has condemned them. *See* J. F. Due, *State and Local Sales Taxation* 250 (1971) ("Failure to allow credit creates gross discrimination against interstate commerce"); M. Cruz, *The Use Tax: Its History, Administration, and Economic Effects* 48, n. 32 (1941) and authorities there cited; Dane, *Movable property in interstate commerce,* 48 J. Taxation 176, 179-80 (1978); Comment, *Compensating Use Taxes,* 18 Ark L. Rev. 321, 328-29 (1964-65); Note, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business,* 75 Harv. L. Rev. 953, 999 (1962); Note, *Economic Neutrality and the Compensating Use Tax,* 16 Stan. L. Rev. 1016 (1964). Even commentators who would permit use taxes without a corresponding credit for sales tax paid other states have admitted their deleterious economic effects. *See* Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way,* 38 Colum. L. Rev. 49 (1938) (recognizing "clear economic authority showing that such [compensating use] taxes actually discriminate against interstate commerce").

But Vermont's motor vehicle tax is not fairly apportioned. It is instead a one-time levy in the amount of four percent of the value of the car. The tax does not give credit for similar levies already paid elsewhere, nor does it depend in any way on the amount of use that occurs in Vermont. As a result, Vermont's tax provides those in appellants' position with a considerable incentive to alter their car purchasing decisions. As will be demonstrated in the next section, such a tax system fails the Commerce Clause test recently outlined by this Court in *Container Corp.* and *Armco.*

2. Vermont's Motor Vehicle Purchase And Use Tax Fails To Meet The Commerce Clause Test Established By Armco, Inc. And Container Corp.

Last term, this Court reaffirmed its decision in *Container Corp.* that a state tax must be "internally consistent" to pass muster under the Commerce Clause. *Armco,*

Inc., 52 U.S.L.W. at 4789 (1984). Under *Container Corp.* and *Armco*, a state may only adopt a tax scheme which, *if adopted by every other state*, would not discriminate against interstate commerce. Vermont's motor vehicle tax fails that test.

Armco and *Container Corp.* afford a state some leeway to "frame its own system of burdens and exemptions without heeding systems elsewhere." *Henneford*, 300 U.S. at 587. For example, a state is free to impose a tax on sales, even though that tax might place producers in a second state, which had a manufacturing tax but no sales tax, at a competitive disadvantage in local markets. The sales tax would survive under *Armco* and *Container Corp.* because it would not burden interstate commerce if adopted by every other state.

Nevertheless, there are limits under the Commerce Clause to a state's taxing power, as the result in *Armco* itself demonstrates. There, the Court rejected a gross receipts tax, imposed by West Virginia on businesses selling tangible property at wholesale, which exempted local businesses. 52 U.S.L.W. at 4789. Plainly, such a tax would affect interstate commerce considerably if adopted by every other state in the Union, by making it more difficult for manufacturers to sell products outside of their home states.

Vermont's Motor Vehicle Purchase and Use Tax is similarly flawed. If every state imposed an unapportioned motor vehicle use tax without granting credit for sales tax paid elsewhere, the effect would be at least as significant as that in *Armco*. Every out-of-state motor vehicle purchase would be subject to double taxation, and

every interstate transfer of such property would trigger yet another substantial and unapportioned tax. Large, expensive mobile equipment, including automobiles, trucks, oil drilling rigs, construction equipment, and the like, could face use taxes of four, five, or six percent annually or even more frequently, depending how often such property moved across state lines. Owners of such equipment would face powerful incentives to alter their buying decisions for tax rather than valid economic concerns, just as appellants in this case faced an incentive to wait until they moved to Vermont to purchase their cars. Such economic distortions cannot be sanctioned under *Armco*.

CONCLUSION

Vermont's Motor Vehicle Purchase and Use Tax facially discriminates on the basis of residency in granting credit for sales taxes paid other states. Vermont imposes a tax on those who, like appellants, own automobiles and move to Vermont. Residents in otherwise identical circumstances avoid the tax.

Vermont's motor vehicle tax may be viewed from several legal perspectives. Because it is triggered when new residents first register automobiles purchased out of state, it discriminates against such individuals and in favor of older residents. That discrimination violates the Equal Protection Clause, since Vermont has no adequate justification for it.

The motor vehicle tax may also be analyzed under the Privileges and Immunities Clause, since only those who are nonresidents when they purchase their cars outside of

Vermont are required to pay it. The tax thus burdens a group with no political voice in Vermont, the very result the Clause was meant to forbid. There is no doubt that the Constitution protects nonresidents from unequal tax treatment unless they are a "peculiar source of the evil," an argument Vermont has not and cannot assert in this case.

Finally, the Vermont tax may be viewed in the context of interstate commerce. Because the tax was designed to and does provide an illegal incentive to purchase cars in Vermont, it cannot survive the proper "strict rule of invalidity" under the Commerce Clause. Further, because the motor vehicle tax is not fairly apportioned and does not provide a tax credit for those in appellants' position, it fails the Commerce Clause test set out in *Armco, Inc.* and *Container Corp.*

Accordingly, the opinion of the Vermont Supreme Court should be reversed and the motor vehicle use tax paid by appellants refunded.

Respectfully submitted,

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APPENDIX A

Vermont Motor Vehicle Registration Statutes

Vt. Stat. Ann. tit. 23, § 4. *Definitions.*

Except as may be otherwise provided herein, and unless the context otherwise requires in statutes relating to motor vehicles and enforcement of the law regulating vehicles, as provided in this title and part 5 of Title 20, the following definitions shall apply:

. . .

(30) "Resident" shall include all legal residents of this state and in addition thereto, any person who accepts employment or engages in a trade, profession or occupation in this state for a period of at least six months. Also in addition thereto, any foreign partnership, firm, association or corporation having a place of business in this state shall be deemed to be a resident as to all vehicles owned or leased and which are garaged or maintained in this state.

Vt. Stat. Ann. tit. 23 § 301. *Persons required to register.*

Residents as defined in section 4 of this title, except as provided in section 301a of this title, shall annually register motor vehicles owned or leased for a period of more than thirty days and operated by them, unless currently registered in Vermont. A person shall not operate a motor vehicle nor draw a trailer or semi-trailer on any highway unless such vehicle is registered as provided in this chapter.

APPENDIX B

State Use Tax Statutes

Twenty-five states provide credit against use tax for sales tax or use tax paid any other state, whether or not the state of prior taxation provides a reciprocal benefit:

Arizona, Ariz. Rev. Stat. Ann. § 42-1409(A) (2) (Supp. 1984).

Arkansas, Ark. Stat. Ann. § 84-4101 (1980) (Multistate Tax Compact, Art. V, § 1).

California, Cal. Rev. & Tax Code § 6406 (West 1970).

Colorado, Colo. Rev. Stat. § 39-26-203(1) (k) (1982).

Connecticut, Conn. Gen. Stat. § 12-430(5) (1983).

Delaware, Del. Code Ann. tit. 30, § 3002(a) (4) (1975) ("motor vehicle document fee") (credit available only if the vehicle was previously registered in another state and if the tax was paid within 90 days).

Florida, Fla. Stat. Ann. § 212.06(7) (West Supp. 1984).

Hawaii, Hawaii Rev. Stat. § 238-3(i) (Supp. 1983).

Idaho, Idaho Code § 63-3621(k) (Supp. 1984).

Illinois, Ill. Ann. Stat. ch. 120, 439.3(d) (Smith-Hurd 1984).

Iowa, Iowa Code § 423.25 (1971).

Kansas, Kan. Stat. Ann. §§ 79-3704(c), 79-3705 (1977).

Maine, Me. Rev. Stat. Ann. tit. 36, 1862 (1978).

Minnesota, Minn. Stat. Ann. § 297A.24 (West Supp. 1984).

Missouri, Mo. Ann. Stat. §§ 144.450 (Vernon 1976) (motor vehicles), 144.615(5) (Vernon 1976) (general use tax).

New Mexico, N.M. Stat. Ann. § 7-9-79A (1983).

Ohio, Ohio Rev. Code. Ann. § 5741.02(C) (5) (Page Supp. 1984).

Rhode Island, R.I. Gen. Laws § 44-18-30-A (1980).

Tennessee, Tenn. Code Ann. § 67-6-507(a) (Supp. 1984).

Utah, Utah Code Ann. § 59-16-4(h) (Supp. 1983).

Virginia, Va. Code § 58-441.9 (1974).

Washington, Wash. Rev. Code Ann. § 82.12.035 (1981).

Wisconsin, Wis. Stat. § 77.53(16) (1982).

Wyoming, Wyo. Tax Rep. (CCH) ¶61,406 at 6165-6168 (administrative interpretation).

Three states give credit against use tax for sales tax or use tax paid any other state, whether or not the state of prior taxation provides a reciprocal benefit, with respect to their general use taxes, but deny credit with respect to motor vehicles:

Indiana, Ind. Code §§ 6-2.5-3-5(a) (1984) (providing credit), 6-2.5-3-5(b) (1984) (denying credit with respect to motor vehicles).

Maryland, Md. Ann. Code art. 81, §375(c) (1980) (providing credit with respect to general use tax); Md. Transp. Code § 13-809 (1984) (no credit on motor vehicle excise tax).

Oklahoma, Okla. Stat. Ann. tit. 68, §§ 1404(c) (1966) (providing credit against general use tax), 2103 (Supp. 1984) (no credit against motor vehicle excise tax).

Fifteen states give credit against use tax for sales tax or use tax (or, in one case, only for sales tax) paid another state if the other state provides a reciprocal privilege:

Alabama, Ala. Code § 40-23-65 (1975).

Georgia, Ga. Code Ann. § 48-8-42 (1982).

Kentucky, Ky. Rev. Stat. Ann. §§ 139.510 (Baldwin 1984) (general use tax) (credit for sales tax only), 138.460(5) (Baldwin 1984) (motor vehicle usage tax).

Louisiana, La. Rev. Stat. Ann. tit. 47, § 303A (West 1970).

Massachusetts, Mass. Gen. Laws Ann. ch. 64I, § 7(c) (West Supp. 1984).

Michigan, Mich. Comp. Laws Ann. § 205.94(e) (West Supp. 1984).

Mississippi, Miss. Code Ann. § 27-67-7(a) (Supp. 1984) (credit available unless automobile or other property was first used in Mississippi).

Nebraska, Neb. Rev. Stat. § 77-2704(4) (Supp. 1983).

New Jersey, N.J. Stat. Ann. § 54:32B-11(6) (West Supp. 1984).

New York, N.Y. Tax Law § 1118(7)(a) (McKinney 1975).

North Carolina, N.C. Gen. Stat. § 105-164.6(4) (Supp. 1983).

North Dakota, N.D. Cent. Code § 57-40.2-11(1983).

Pennsylvania, Pa. Stat. Ann. tit. 72, § 7206 (Purdon Supp. 1984).

South Dakota, S.D. Codified Laws § 10-46-6.1 (1982).

Texas, Tex. Tax Code Ann. § 151.303(c) (Vernon 1982).

Vermont, 32 Vt. Stat. Ann. tit. 32, §§ 9744(a)(3) (1981) (general use tax), 8911(9) (1981) (motor vehicle purchase and use tax) (credit for residents only).